

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAUNITED STATES SECRETARY OF  
CONGRESS,

No. C-11-01397-DMR

Plaintiff(s),

**REPORT AND RECOMMENDATION  
REGARDING APPLICATION TO  
PROCEED IN FORMA PAUPERIS**

v.

DIAMOND BANKS,

Defendant(s).

Plaintiff filed a Complaint and an Application to Proceed *In Forma Pauperis* before this Court. *See* Docket Nos. 1 and 3. Plaintiff has not filed a consent or declination as to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). Under 28 U.S.C. § 1915(a), a court can allow a federal suit to be filed *in forma pauperis*, without prepayment of fees, “by a person who submits an affidavit... that the person is unable to pay such fees or give security therefor.” Because Plaintiff has filed an affidavit adequately alleging that he is without the means to pay the filing fee in this action, the Court GRANTS Plaintiff’s Application to Proceed *In Forma Pauperis*.

Section 1915 requires a court to dismiss a complaint prior to service if it is frivolous or fails to state a claim upon which relief can be granted. *See* 28 U.S.C. § 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc). Because Plaintiff is not represented by counsel, his Complaint is to be construed liberally, and the Court has the discretion to grant leave to amend

1 his Complaint upon dismissal. *See Hebbe v. Pliler*, 611 F.3d 1202, 1205 (9th Cir. 2010); *Lopez*, 203  
2 F.3d at 1127-28. Where a *pro se* plaintiff is proceeding *in forma pauperis*, dismissal without leave  
3 to amend is appropriate only if it is clear that no amendment can cure the defect. *See Franklin v.*  
4 *Murphy*, 745 F.2d 1221, 1228 n.9 (9th Cir. 1984) (internal quotations and citation omitted).

5 All plaintiffs must allege an actual case or controversy under Article III of the United States  
6 Constitution. *See, e.g., In re Redic*, No. C 08-4199 MHP (pr), 2008 WL 4962689, at \*1 (N.D. Cal.  
7 Nov. 19, 2008). Otherwise, a federal court has no power to entertain the suit. *See Warth v. Seldin*,  
8 422 U.S. 490, 498 (1975). As presently drafted, the Complaint appears to be without merit in that it  
9 fails to set forth a cognizable claim. The Complaint contains little more than a caption, states no  
10 cause of action and appears only to reference a pending restraining order application in the Superior  
11 Court of California for the County of San Francisco. Accordingly, with nothing more than a vague  
12 reference to a state court proceeding over which this Court would not have jurisdiction, amendment  
13 would be futile and therefore the Court recommends that the Complaint be DISMISSED without  
14 prejudice and without leave to amend and that the Clerk be ordered to close the case file. The clerk  
15 is directed to reassign this case to a District Judge.

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17 Dated: April 22, 2011



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19 DONNA M. RYU  
20 United States Magistrate Judge  
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